UTAH STATE LEGISLATURE
WATER DEVELOPMENT COMMISSION

"State – Federal Livestock Water Rights Conflicts"

Statement of the

UTAH FARM BUREAU FEDERATION

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Chief Executive Officer
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Commission Members:

The Utah Farm Bureau Federation is the largest general farm and ranch organization in the state of Utah representing more than 27,000 member families. We represent a significant number of livestock producers who use the federal lands for sheep and cattle grazing. Livestock ranching is an important part of the historic, cultural and economic fabric of the state of Utah and major contributor to the state's economy. In the second most arid state in the nation, water was and is our limiting factor.

Utah food and agriculture contributes to the state's economic health and provides jobs to thousands of our citizens. Utah farm gate sales in 2012 exceeded $1.6 billion. Utah State University analyzed the forward and backward linkages to industries like transportation, processing, packaging and determined food and agriculture are the catalyst for $17.5 billion in economic activity, or about 14 percent of the state GDP, and provides employment for more than 70,000 Utahns.

As water has historically been developed in the west, it was for the production of food and fiber. According to the Utah State Engineer, farmers, ranchers and agriculture interests own and control 82 percent of Utah's developed water. The landscape of the west is changing with growing populations west-wide and Utah is one of the fastest growing states in the nation. With nearly 70 percent of Utah owned and controlled by the federal government, sovereignty and state control of our water resources is critical to food production and security, growth and our economic future.

Utah Farm Bureau delegates in November 2012 adopted policy that calls on the federal government to "not claim ownership of water developed on federal land." In addition, Farm Bureau policy calls for "state control of water rights, stock water rights to be held by the individual grazing permittee and protection against federal encroachment on state waters."

HISTORY

Scarcity of water in the Great Basin and southwest United States led to the development of a system of water allocation that is very different from how water is allocated in regions graced with abundant moisture. Rights to water are based on actual use of the water and continued use for beneficial purposes as determined by state laws. Water rights across the west are treated similar to property rights, even though the water is the property of the citizens of the states. Water rights can be and often are used as collateral on mortgages as well as improvements to land and infrastructure.

The arid west was transformed by our pioneer forefathers through the judicious use of the precious water resources. Utah is the nation's second most arid state, second only to Nevada. For our predecessors, protecting and maximizing the use of the water resources was not only important, it was a matter of life and death.

The timeless quote attributed to Mark Twain, "Whiskey is for drinking, water is for fighting over," vividly describes the reality of water in the west whether protecting one's water from an eager neighbor who takes his irrigation water-turn earlier than prescribed or federal agents who have identified a course of action that challenges water ownership and the sovereignty of state water laws.

The United States Congress passed the Act of July 26, 1866 [subsequently the Mining Act or Ditch Act of 1866] that became the foundation for what today is referred to "Western Water Law." The Act recognized the common-law practices that were already in place as settlers made their way to the western territories including Utah. Congress declared:

> *Whenever, by priority of possession, rights to the use of water for mining, agriculture, manufacturing, or other purposes, have vested and accrued, and the same are recognized and acknowledged by the local customs, laws and decisions of courts, the possessors and owners of such vested rights shall be maintained and protected in the same; and the right of way for the construction of ditches and canals for the purposes herein specified is acknowledged and confirmed; but when ever any person, in the construction of any ditch or canal, injures or damages the possession of any settler on the public domain, the party committing such injury or damage shall be liable to the party injured for such injury or damage. (43 USC Section 661)*

This Act of Congress obligated the federal government to recognize the rights of the individual possessors of water, but as important, recognized "local customs, laws and decisions of state courts."

Western water law or the "doctrine of prior appropriation" governs the use of water in many of the states in the west. The fundamental principle embodied in the doctrine of prior appropriation is that while no one may own the publicly owned resource, persons, corporations or municipalities have the right to put the water to beneficial use any defined by state law. For purposes of beneficial use, the allocation of right rests in the principle of "first in time, first in right." The first person to use the water is the senior appropriator and later users are junior

appropriators. In Utah, and across the arid west, this principle protects the senior water right priority for this scarce and valuable resource.

To put the water to beneficial use, the appropriator makes application to the state to divert that right in water from its natural course. Beneficial uses are determined by state legislatures generally including livestock watering, irrigation for crops, domestic and municipal use, mining and industrial uses.

The rights of the states to govern water has been recognized by generations of federal land management agencies as well and the United States Congress.

FOREST SERVICE ESTABLISHED:

In 1907, Gifford Pinchot, "father" of the United States Forest Service (USFS) and the First Chief Forester explicitly reassured western interests in the agency's "use book" noting that water is the sovereign right of the state. Pinchot declared:

> ***"The creation of the National Forest has no effect whatever on the laws which govern the appropriation of water. This is a matter governed entirely by State and Territorial law."***

BUREAU OF LAND MANAGEMENT ESTABLISHED:

On July 28, 1934, Congress passed the Taylor Grazing Act, establishing what is now known as the Bureau of Land Management (BLM). Again recognizing the Act of 1866 and common law use of the water resources, grazing permits were issued based on past use "to those within or near a district who are land owners engaged in the livestock business, bona fide occupants or settlers or owners of water or water rights,…" Further, the Taylor Grazing Act stated:

> ***"nothing in this Act shall be construed or administered in a way to diminish or impair any right to the possession and use of water for mining, agriculture, manufacturing and other purposes…"***

McCARRAN AMENDMENT:

In 1952, Congress established a unified method to allocate the use of water between federal and non-federal users in the McCarran Amendment. (43 USC Section 666) The McCarran Amendment waives the sovereign immunity of the United States for adjudications for all rights to use water. This is evidence of the Congressional recognition of the primacy of the western states' interests in regulating and administering water rights. As the Report of the Federal Water Rights Task Force created pursuant to Section 389(d)(93) of P.L. 104-127, page 1 (August 25, 1997) states:

> **"Congress has addressed this issue repeatedly, and each time the issue has been resolved in favor of deference to the ability of the states to decide who has the water right, how much it is and how and when it may be exercised…"**

ABANDONMENT OF THE HISTORIC OBLIGATION

With passage of the Federal Land Policy Management Act (FLPMA) in 1976, the historic relationship between federal agencies, state and local governments and grazing permittees took a dramatic change of course. The US Forest Service and the Bureau of Land Management began a resource management planning process for grazing allotments. As part of the new Congressional authority granted the federal land management agencies, the USFS and BLM began to administratively formulate new grazing and water policies. FLPMA now required agency permission. Holders of livestock water rights who needed to develop or maintain a water impoundment or structure on Forest land was now required to apply for and obtain a special use permit from the FS. Permits to water rights last a prescribed term. The FS may or may not re-issue the permit and may impose different conditions.

This exercise of greater authority by agency personnel ushered in an era of conflict and distrust of the USFS and BLM. The federal agents ignored or openly repudiated the principles of prior appropriation and sovereign water rights that had been in place since settlement of the American West.

When conflicts arose, the courts generally upheld the United States right to control, regulate and even revoke the ability to use its land for the purpose of accessing state appropriated water rights!

In a letter dated June 29, 1984, Robert H. Tracy, Director of Watershed and Air Management for the US Forest Service stated nine reasons why his agency needed to control the water and why stock water rights should remain on the land rather than with the ranchers holding the grazing permits. This quantifies a transition by the USFS toward a more hostile course of action as the federal agency deals with the following generations of the western settlers.

Confrontation between federal land managers and livestock grazing interests became a part of doing business for permittees. Mostly, those with sheep and cattle grazing permits capitulated to the force of the federal agents and the courts. Cuts in grazing permits and the federal agencies accumulating suspended use grazing permits became common place in Utah and across the west.

Most permittees, but not all, heeded the warning that to fight the federal government is futile. Few had the financial resources to engage in what the federal agencies assured livestock permittees would be a costly and protracted legal battle. The ranchers were and continue to be at a decided disadvantage to the tax-payer funded deep federal pockets and army of agency lawyers they would meet at trial.

A pattern has emerged out of the federal land management agencies that disregards, ignores or even displays distain for what the First Chief Forester and the Taylor Grazing Act specifically cites and recognizes as a sovereign right of the states.

INTERMOUNTAIN REGION – U.S. FOREST SERVICE
Authorization of Western Water Grab

National and Intermountain Region Forest Service policies authorize and instruct agency personnel on the "establishment of water rights in the name of the United States" and have provided guidance and "State Specific Considerations" outlining the steps to obtain a livestock water right.

Historic commitments and statutory obligations have been set aside for decades. Forest personnel have been filing on water rights and making diligence claims in Utah for the past 50 years. The arrogance to honoring state water sovereignty is outlined in the United States Code (Title 16, Chapter 2 National Forests, Subchapter I Establishment and Administration, Section 526 Establishment and Protection of Water Rights) provides guidance on the agency's willingness to challenge sovereign water rights in the western states:

> *"There are authorized to be appropriated for expenditure by the Forest Service such sums as may be necessary for the investigation and establishment of water rights, including the purchase thereof or of lands or interests in lands or rights-of-way for use and protection of water rights necessary or beneficial in connection with the administration and public use of the national forests".*

In an August 15, 2008 Briefing Paper, Regional Forester Harv Forsgren explained the "United States, through the Forest Service, has filed thousands of claims for livestock water on federal lands. The Forest Service in the Intermountain Region has filed or holds in excess of 38,000 stock water rights…"

The briefing paper continues, "In recent years, ranchers and community leaders have contested ownership of livestock water rights. Some ranchers believe that they should hold the water rights because their livestock actually use the water. Land management agencies, such as the US Forest Service, have argued that water sources used to water livestock on Federal Lands are integral to the land where the livestock grazing occurs, therefore the United States should hold the water rights."

Intermountain Regional Forester Forsgen in agency guidance issued on August 29, 2008 referenced USFS policy (FSM 2541.03 and FSM 2541.32) and directed his personnel as follows:

> *"…obtain and maintain water rights as needed for Forest Service purposes under State and Federal law in the name of the United States. Livestock grazing, by its nature requires water. Sustainable livestock grazing is a valid and important use of National Forest System lands. Approximately 70 percent of those lands with the Intermountain Region are within livestock allotments. To ensure the continued viability of the federal livestock grazing program, the United States, through the Forest Service, has secured thousands of livestock water rights on federal lands pursuant to State law. The United States cannot obtain livestock water rights via Federal law…"*

*The Intermountain Region of the U.S. Forest Service includes Utah, Nevada, Southern Idaho, Western Wyoming and small portions of Western Colorado and Eastern California – Generally considered the Great Basin.

UTAH:

Recognizing the need to protect the state's water and to protect proven livestock water rights on federal land, ranching interests sought help from the Utah Legislature. In 2008, House Bill 208, Livestock Water Rights Act was passed by the Utah Legislature. The legislation was designed to recognize grazing permittee's water rights while protecting the state's water as appurtenant to the land. (Utah Code Title 73 Chapter 3 Section 31) Water Right for Watering Livestock on Public Land states:

"A livestock water right is appurtenant to the allotment on which the livestock is watered."

The most compelling argument that the FS must insure the availability of livestock water for a viable federal grazing program was addressed by Utah policymakers.

The conflict for the FS came in two parts in Subsection (5) that authorized the Utah State Engineer to issue a certificate of livestock water right only to a defined beneficial user and abandoned or forfeited livestock water rights would be held by the state of Utah:

1) "*the beneficial user of a livestock watering right is defined as the grazing permit holder for the allotment to which the livestock watering right is appurtenant."*

2) *"…be held by the Utah State Department of Agriculture and Food (UDAF)."*

The State Engineer manages beneficial use of the state's water. UDAF, as livestock water rights custodial, can manage inventoried rights for livestock permittees to assure the state livestock water use policy on federal lands is in harmony with FS and BLM grazing mandates.

However, the state inadvertently defined "beneficial user" as the *"person that owns the grazing permit"* without specifying who owns the livestock necessary to put the livestock water right to beneficial use!

The Regional Forester jumped on the legislature's error and broad definition of permit ownership arguing they are the person that owns the grazing permit.

The Regional Forester has submitted a grazing permit for each active allotments in the state of Utah to the State Engineer and ***shown that the USFS is the owner of the permit.*** The State Engineer has issued nearly 500 livestock water certificates to the USFS for these allotments. The Regional Forester recognized these certificates are not water rights, but notes in the August 29th guidance that, "Until a court issues a decree accepting these claims, it is not know whether or not these claims will be recognized as water rights." It appears the USFS has already teed up a legal challenge to state sovereign water rights seeking to change livestock water certificates into US Forest Service water rights.

New Intermountain Region FS Guidance – August 29, 2008:

Citing Intermountain Region policy (R-4 FSM 2241) proclaiming that the FS must have a water right on a source before funds are expended on the ground or construction begins on any livestock water development or facility as defined in regulations (36 CFR 222.9(b)(2)).

The Regional Forester issues a prohibition to livestock water rights with private funds if the water right is solely owned!

Guidance states: “The Intermountain Region will not invest in livestock water improvements, nor will the agency authorize water improvements to be constructed or reconstructed with private funds where the water right is held solely by the livestock owner.”

As an outcome of the state issuing livestock water certificates, the FS threatened the state that without the United States being able to hold an ownership interest in the livestock water, they would be unable (or unwilling) to allow livestock permittees with livestock water rights to access, develop or maintain the water on federal lands.

Following the threats by Regional Forester Forsgren, in 2009 the Utah Livestock Water Rights law was amended as follows:

“On or after May 12, 2009, a livestock watering right may only be acquired by a public land agency jointly with the beneficial user.”

The 2009 action also amended out of the law the state’s obligation to hold vacated livestock water rights at the Utah Department of Agriculture and Food.

The USFS now has state law allowing joint ownership of a Utah Livestock Water Certificate.

Tooele County Grazing Association:

In the Spring of 2012, livestock grazing permittees meeting with the local Forest managers were confronted with a packet of information related to the FS seeking a “sub-basin claim” from the state of Utah. Where a sub-basin claim is granted by the Utah Division of Water Rights, changes in use and diversion can be done without state approval. The permittees were asked to sign a “change of use” application which would have allowed the FS to determine what the use would be, including changing use from livestock water to wildlife, recreation or elsewhere.

When permittees objected, they were told that not complying with the FS request could adversely affect their “turn out” or the release of sheep and cattle onto Forest allotments.

Utah Farm Bureau was concerned that the permittees were being blackmailed into actions undermining their proven state water rights. A meeting was held on May 11, 2012 in Tooele County that included grazing permittees, Forest personnel, Utah State Engineer, County Commissioners and state and local Farm Bureau leaders.

When confronted with the charge of blackmailing permittees into signing the change of use applications, the Forest agents objected and said they had not engaged in such action. The permittees countered “yes they did” and pointed out specifically one of the Forest employees. The retort by the Forest employee - “well you must have misunderstood!”

A follow up meeting was held August 28, 2012 the Farm Bureau Center in Sandy which included ranching interests, Intermountain Forester Harv Forsgren, Kathleen Clarke the

Governor's Public Lands Coordinator, Kent Jones Utah State Engineer, Leonard Blackham Utah Commissioner of Agriculture, Leland Hogan President of the Utah Farm Bureau and Randy Parker, Farm Bureau CEO.

Forsgen noted that what the Forest was asking the permittees to agree to joint ownership as provided in the 2009 amended Utah Livestock Water Rights law - not to sign a change of use application.

As part of the broader understanding of Utah water law, the Utah State Engineer led a discussion and provided background on Utah water diligence claims, forfeiture and the impacts of ongoing actions by the US Forest Service.

Diligence Claims:

The United States Forest Service has 16,000 livestock water rights and claims for livestock water rights covering all Forest administered grazing allotments in Utah.

For more than one-half century, the US Forest Service has been filing diligence claims on Forest administered lands. These diligence claims being filed by the federal agency pre-date the 1903 water legislature and also pre-date the 1905 establishment of the US Forest Service. Mr. Forsgren said "the diligence claims are made on behalf of the United States, which was the owner of the land where the livestock grazed and livestock watering took place and that action established the federal government's water rights. Currently, the USFS administers the land under the Organic Act and other federal laws, and therefore is the appropriate agency to file water rights claims on behalf of the United States. However, the water right was established under State law, and is being claimed by the United States under State law."

A "Diligence Right" or "Diligence Claim" under Utah law is a claim to use the surface water where the use was initiated prior to 1903. In 1903, statutory administrative procedures were first enacted in Utah to appropriate water. Prior to 1903, the method for obtaining the right to use water was simply to put the water to beneficial use. To memorialize a diligence claim, the claimant has the burden of proof of the validity of beneficial use prior to 1903.

Forfeiture:

Because water in Utah is considered a scarce and valuable public resource, Utah's laws have been designed to encourage full responsible development of water supplies and to discourage efforts to speculate in or monopolize the resource. As a result of this approach, it has been believed necessary to assure that those who acquire rights to use Utah's water actually place it to beneficial use. Although the statute has changed since first adopted in 1903, the current law states as follows in Utah Code Section 73-1-4:

"When an appropriator or the appropriator's successor in interest abandons or ceases to use all or a portion of a water right for a period of seven years, the water right or the unused portion of that water right is subject to forfeiture in accordance with Subsection (2)(c). . .."

Utah forfeiture laws, in the instance of livestock water rights, provides an interesting dilemma and potential for confrontation between livestock interests that proved up on the water right based on the state's constitutional method and the claims of the land management agency.

Access:

Recognizing the federal government controls 67 percent of Utah, USFS and BLM state administrative personnel including the Regional Forester, BLM State Director or even in the district offices maintain dramatic control. FS agents have the ability to control allotment access, determine if there will be use of the permittee's livestock water right, establish the numbers of sheep and cattle utilizing the water and ultimately determine the ability of the rancher to put the public's water resource to beneficial use.

It seems ironic that the USFS has the ability to manage the land and access to the water that could adversely impact permittees and their ability to put their livestock water rights to beneficial use. With thousands of diligence claims pending, thousands of certificates of joint ownership filed and the reality that if the agency exercises unrighteous dominion – where water rights are forfeited based on agency actions - what rancher will ever file for livestock water rights on Forest lands?

This scenario appears to offer the federal land management agencies the opportunity for an orderly transition of Utah water rights

Fundamental Question:

Legally can the US Forest Service or even BLM, under the state's constitutional method, validate a claim on Utah water where the agency did not and does not own the livestock putting the water to beneficial use while only claiming an ownership interest in the land?

Forsgren warned that "this is a 'slippery slope,' that has led to the Nevada conundrum and hopes this is not the tact that will be taken in Utah."

2013 Utah Legislative Action:

Utah State Representative Ken Ivory authored H.J.R. 14 A Joint Resolution on Water Rights that declares that the actions and claims of the United States Forest Service are undermining Utah's state sovereignty and that based on the state's obligation to protect, preserve and defend the health, safety and welfare of its citizens the state must maintain jurisdiction over the water resources of this state. In addition, Representative Ivory sponsored H.R. 166 to amend the Utah Livestock Water Rights on Public Lands statute.

The H.J.R 14 states among other things:

- Beneficial use is defined as domestic use, irrigation, stock watering, manufacturing, mining, hydropower, municipal use, aquaculture, recreation, fish and wildlife, among others.
- The Intermountain Forester will not invest in water improvements, nor will the agency allow improvements to be constructed or reconstructed with private funds where the right is held solely by the livestock owner.
- All improvements in developing, redeveloping or maintaining a livestock permittees' water rights are all claimed as the property of the United States.
- Through the use of pressure tactics, the USFS has coerced livestock permittees into signing certificates of joint ownership or change of use applications.

- Looking to expand federal interests and control in Utah, the USFS has filed more than 16,000 water rights claims of ownership on livestock water rights.
- Claims based on control of the public lands do not constitute the application of the water to beneficial use under Utah's constitutional method of appropriation and beneficial use.
- In the central Utah community of Scipio, the USFS used its diligence claim filings on use by nineteenth century settlers and then used the filings, and the threat of protracted litigation, to dispossess direct descendants of the settlers from their legitimate water rights.

H.R. 166 Water Rights Amendments authorized:

- A beneficial user, meaning a livestock permittee, the right to access and improve an allotment as necessary for the beneficial user to beneficially use, develop, and maintain the beneficial user's water right appurtenant to the allotment.
- A study of the state's jurisdiction over water rights including conflicts between local interests and the federal government and to determine what actions would be needed to maintain and defend state jurisdiction over water rights.

NEVADA:

In 2003, the State of Nevada passed Senate Bill 76. The bill precludes the Nevada State Engineer from approving any new applications, permits or certificates filed by the United States for stock water.

NRS 533.503 (1) *The State Engineer shall not issue a permit to appropriate water for the purpose of watering livestock unless:*

(a) The applicant for the permit is legally entitled to place the livestock on the lands for which the permit is sought

The USFS stated in its August 2008 briefing paper, "Since current Nevada livestock water right law does not allow the FS to acquire any new livestock water rights on National Forest System lands, this is causing difficulties for the FS because our policy requires that a livestock water right be held in the name of the United States of America before we can invest federal funds in livestock water developments.

Since Intermountain Region policy also states, "nor will the agency authorize water improvements to be constructed or reconstructed with private funds where the water rights held solely by a livestock owner."

It is clear that under the current policy conflicts between the land management agency and the state of Nevada – there is in effect no new water development on federal land in a state where 86 percent of the land is owned and controlled by the federal government.

ARIZONA

Tombstone Arizona illustrates the level to which the USFS can hold local interests hostage. Tombstone, for more than 130 years has piped its water from the Huachuca Mountains 30 miles away. Even after the Huachuca's were designated a federal wilderness area in 1984, Tombstone was allowed to maintain its road and access to its springs providing Tombstone with water for culinary needs and maybe as important fire protection and public safety.

In 2011, torrential rains destroyed the city's pipes and infrastructure supplying water from mountain springs and wells they developed in the nearby Huachuca Mountains. Tombstone notified the USFS they needed to repair the damage as they had in the past. The FS challenged Tombstone's ownership right to the water. After documenting their water ownership, Tombstone sought relief from the onerous federal regulations and FS oversight based on the state's public health, safety and welfare obligations.

When the FS finally gave the authorization, the federal agents established a new standard for the repair work by the city. They had previously been able to make repairs with machinery. Tombstone was forbidden from using any mechanized equipment to make the repairs.

With only shovels, picks and wheelbarrows to remove debris and repair broken water pipes, the mayor of Tombstone and city crews started into the FS administered "wilderness area." They were met by armed Forest Service agents demanding no "mechanized equipment" (wheelbarrows) could be taken up on the mountain.

In a year of severe drought and dramatic heat, even for the desert southwest, the city of Tombstone was at risk because of over-zealous federal bureaucrats and an uncaring government bureaucracy.

RECOMMENDATIONS

1) Congress must act to recognize the historic and statutory obligation of honoring the sanctity of sovereign state water rights.
2) Federal agencies must honor state courts in water matters, including the state defined methods of beneficial use and the doctrine of prior appropriation or first in time, first in right.
3) Federal agencies must not use adverse management of the federal lands, specifically related to grazing, access, development and maintenance of water to gain control of water located on federal lands through abuse of the state's water forfeiture laws.
4) The United States must not disrupt the business of livestock grazing critical to the history, culture and local economies using the judicial system and protracted, costly litigation to emotionally or financially break the holder of livestock water rights on federal lands.
5) The federal government must develop a working relationship with the states - state engineers and policymakers - to forge an understanding whereby state water law and the needs of the federal land managers are complimentary.
6) Congress must act to allow Utah and other western public lands states to determine the use of their natural resources - including water – which are in the best interests of the citizens of the state and its future, as is the case with states across the nation.

CASE LAW

A summary of federal and state case law that establishes important livestock water rights and agency authority as relates to ranchers rights to hold and access the state's waters located on federal land and defining livestock water rights under the state's beneficial use standards:

PROPERTY RIGHTS AND ACCESS:

Wayne Hage vs. United States
"Takings"- U.S. Court of Federal Claims (2008)

Wayne Hage vs. United States
"Takings" – Federal Circuit Court of Appeals for Washington DC (2012)

United States vs. Wayne Hage
"Trespass" – Nevada Federal District Court (2013)

According to Ramona Hage Morrison, the daughter of Wayne Hage in an account she personally shared with me: "Conflicts between the Hage family and federal government began in 1979 when my father encountered federal agents on his grazing allotments. This certainly was not an unusual circumstance, except this time the US Forest Service agents were surveying. The result was over-filing with the Nevada State Engineer on Dad's livestock water rights. The water rights being targeted by the Forest Service were the same rights owned by the family and put to beneficial use since 1865, before Nevada was a state and before the US Forest Service was created by an act of Congress in 1905. In what can only be called harassment, the FS began cutting grazing rights and ultimately cancelling them citing overgrazing. Forest Agents continually visited the ranch. Dad received nearly four-dozen letters charging various violations and he was cited for 22 infractions, mostly extremely minor. The USFS required Dad and his employees to maintain 28 miles of ditches across the Nevada desert, protected by Congress in July of 1966, with only picks and shovels. And adding insult to injury, after more than a decade of harassment, in 1991 the USFS impounded Dad's cattle and sold them at auction, keeping $39,000 in proceeds."

In a landmark "Constitutional Takings" case filed in the U.S. Court of Federal Claims (USCFC) in 1991, *Hage vs. United States,* the court had to deal with question of property and ownership and the nature of vested and certificated water rights, easements, rights of way, forage harvest on federal lands and improvements to the grazing allotments. Did the Hage's and other permittees by association have rights associated with cattle harvesting forage on their government grazing allotments and beneficially using the state's water originating on federal lands or were the ranchers merely serfs, grazing at the whim of the U.S. government?

The Hage taking case went to trial in 1998 to determine property interests. In 2004, a second trial was commenced to determine which property had been taken and its value. In 2008, Chief Judge Loren E. Smith ultimately awarded a $4.4 million plus interest judgment against the federal government.

To challenge the USCFC decision and seeking an adverse ruling against Hage in an effort to undermine the Smith decision, the USFS and BLM in 2007 filed in Federal District Court against the estate of Wayne Hage alleging trespass on federal lands. In the 2012 trial in Nevada Federal District Court, Chief Judge Robert C. Jones presided. The "takings" appeal and the "trespass" case were being argued simultaneously. Judge Jones had to recess the Reno proceedings to allow the Hage family to attend the Federal Circuit Court of Appeals hearing in Washington D.C. appeal of the Court of Federal Claims judgment. The Appeals Court, a three judge panel, overturned portions of the Smith decision and financial judgment citing the claims were not ripe. But the Appeals Court expressly did agree that the Hage's have "an access right" to their waters on the federal lands.

The wheels of justice turned ever so slowly for the Hage family. Wayne's wife Jean died in 1996 and him in 2006. Sadly, Wayne Hage who filed the first Fifth Amendment takings case filed in the United States seeking to protect the property rights of western ranchers on federal lands did not live to see justice.

For the eastern judges in the US Forest Service home court in Washington D.C., their decision pivoted on the USFS actions that required Hage to maintain 28 miles of ditches through Nevada's rugged terrain with only hand tools. The lower court had earlier found the restriction prevented Hage from beneficially using his water. The Appeals Court disagree.

In a subsequent portion of the ruling, the Appeals Court found that even though the FS fenced Hage's cattle off a critical watering spring, this was not a physical taking because the fences were up for only five years and some of the water had flowed out of the fenced area where Hage's livestock could access the water.

The Appeals Court rationalized its reversal by determining that since Hage could use some of the water, the FS action did not result in a physical taking of the water right.

Utahns and western water interests should be greatly concerned with the Appeals Court ruling. Based on their definition of a taking, it appears the federal government can fence off any private citizen's water right that resides on federal lands in any jurisdiction – and to take whatever they want without paying compensation as prescribed by the U.S. Constitution.

When the Nevada Federal District Court reconvened in Reno, during questioning for witness credibility, Intermountain Regional Forester Harv Forsgren was found to be lying to the court. In his bench ruling Jones stated: "The most pervasive testimony of anybody was Mr. Forsgren. I asked him, has there been a decline in the region or district in AUMs (permitted animal unit

months grazing). He said he didn't know. He was prevaricating. His answer speaks volumes about his intent and his directives to Mr. (Steve) Williams." Anybody of school age or older knows "the history of the Forest Service in seeking reductions in AUMs and even the elimination of cattle grazing…"

The agency's arrogance was highlighted when Steve Williams, Humbolt-Toiabe Forest Ranger, testified in a court deposition that "despite the right (of the Hages) to use the water, there was no right to access it, so someone with water rights by no permit from the US Forest Service would have to lower a cow out of the air to use the water, for example, if there were no permit to access it."

In May 2013 Judge Jones issued his 104 page historic ruling finding:

- Congress intended to protect the ranchers' preexisting rights by issuing grazing preferences only to established ranchers who could prove historical use of the range and ownership of the water rights under local law and custom.
- A right of access was recognized on federal lands and based on the evidence, the Hage's were awarded a forage right one-half mile around and adjacent to all historic livestock water rights and warned the federal agency that the livestock could not be found in trespass in those areas.
- USFS employee Steve Williams was found in contempt of court and guilty of witness intimidation.
- Tonopah BLM manager Tom Seley as found in contempt of court and guilty of witness intimidation. In addition, he was guilty of having intent to destroy the Hage's property and business interests.
- Williams and Seley were held personally liable for damages exceeding $33,000.
- The Hage's were found guilty of only two minor trespass violations and were fined $165.88
- Regional Forester Harv Forsgren was excluded from testifying at trial during witness credibility hearing for lying to the Court.

Chief Federal District Court Judge Robert C. Jones, June 6, 2012, *U.S. vs. The Estate of Wayne Hage and Wayne N. Hage* stated regarding his findings at trial:

> ***"I find specifically that beginning in the late '70s and '80s, first, the Forest Service entered into a conspiracy to intentionally deprive the defendants here of their grazing rights, permit rights, preference rights."***

NOTE: In early 2013 Harv Forsgren, following Judge Jones witness credibility finding, retired from the United States Forest Service.

DEFINING BENEFICAL USE:

Joyce Livestock vs. United States
Idaho Supreme Court 2007 - Opinion No. 23

In the Joyce Livestock Company vs. United States, the Owyhee County based cattle operation had ownership dating back to 1898 including in-stream stock water rights. The United States over-filed on the Joyce water rights based on a priority date of June 24, 1934 – passage of the Taylor Grazing Act. A special master recommended the water right claimed by the United States be granted. District Court said the special master erred and that the agency lacked the necessary intent. District Court determined that Joyce needed to show evidence that they believed they had acquired such water rights in their grazing permit applications. The United States could not show that Joyce or any of its predecessors were acting as it agents when they acquired water rights. As required, Joyce made application for grazing rights under the Taylor Grazing Act on April 26, 1935. The District Court awarded Joyce water rights with a priority date of April 26, 1935.

Upon appeal, the Idaho Supreme Court upheld the District Court ruling that Joyce had acquired a water right on federal land for watering stock for the following reasons:

1) An appropriator can obtain a water right in non-navigable waters located on federal lands.
2) Under the constitutional method, an appropriator could obtain a water right for stock watering without diverting the water from the water source.
3) Joyce predecessors obtained water rights on federal land for stock watering simply by applying the water to beneficial use through watering their livestock in the springs, creeks and rivers on the range they used for forage.
4) The water rights that the ranchers obtained by watering their livestock on federal land were appurtenant to their patented properties.
5) A water right appurtenant to real property is conveyed with the real property unless expressly reserved or the parties clearly intended that the conveyance not include the water right.

As related to priority dates, the Idaho Supreme Court said the District Court erred in its analysis and remanded for a redetermination of priority dates. Specifically, the High Court said that the Joyce water priority date must be based on their earlier application of the water to beneficial use by grazing livestock.

In closing, the Idaho Supreme Court considered on appeal the in-stream water rights for stock watering claimed by the United States based on ownership and control of the land and the Taylor Grazing Act management obligation. They concluded:

> *"The District Court held that such conduct did not constitute application of the water to beneficial use under the constitutional method of appropriation, and denied the claimed rights. The Idaho Supreme Court concurred holding that because the United States did not actually apply the water to a beneficial use the District Court did not err in denying its claimed water rights."*

ADMINISTRATIVE AUTHORITY

Solid Waste Agency of Northern Cook County vs. U.S. Army Corps of Engineers United States Supreme Court 159, 172-173 (2001)

Without clear Congressional authorization, federal agencies may not use their administrative authority to "alter the federal-state framework by permitting federal encroachment upon traditional state power."

In SWANCC vs. U.S. Army Corps of Engineers the U.S. Supreme Court held that the Corps' use of the long controversial "migratory bird rule" adopted by the Corps and the U.S. Environmental Protection Agency to expand regulatory authority over isolated wetlands exceeded the authority granted by Congress.

The Court chided the agency for over-reaching in its regulatory obligations and authority:

"Where an administrative interpretation of a statute invokes the outer limits of Congress's power, we expect a clear indication that Congress intended that result. This requirement stems from our prudential desire not to needlessly reach constitutional issues and our assumption that Congress does not casually authorize administrative agencies to interpret a statute to push the limit of congressional authority. ***This concern is heightened where the administrative interpretation alters the federal-state framework by permitting federal encroachment upon traditional state power. Unless Congress conveys its purpose clearly, it is not deemed to have significantly changed the federal-state balance.***

This concludes my prepared testimony.

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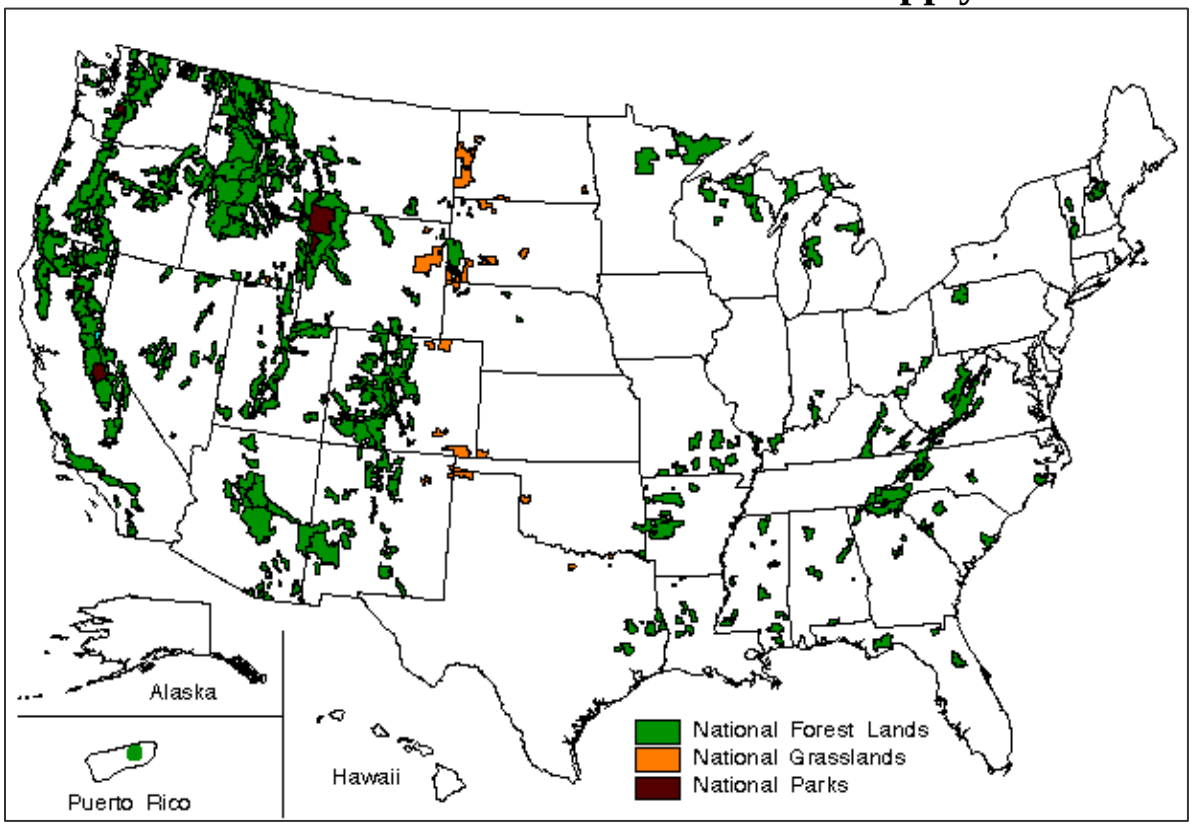
Attachment A

U.S. Forest Service

Importance of National Forest System Lands in the U.S. Continental Water Supply



- National Forest System Lands are the largest single source of water in the continental United States, over 14% of available supply
- Forest Service water resources consist of more than 400,000 miles of rivers and streams and more than 2.2 million acres of ponds and lakes.
- 3,400 Public drinking water supplies that serve more than 66 million people with high quality drinking water.
- There are over 2,000 hydropower dams (18.5 million average homes)
- The Forest Service hosts more than 46 million fishing visits annually
- Over 8,000 water authorizations
- Between 4,000 and 19,000 reservoirs (2,000 owned by the Forest Service).

Attachment B

UNITED STATES FOREST SERVICE

INTERMOUNTAIN REGION